No. 2066.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff in Error,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants in Error.

Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington.
Eastern Division.

BRIEF OF PLAINTIFF IN ERROR

W. H. PLUMMER *and*
HENRY JACKSON DARBY,
Attorneys for Plaintiff in Error.
Spokane, Washington.

FRANKLIN PRESS, SPOKANE

No. 2066.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff in Error,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants in Error.

Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington.
Eastern Division.

BRIEF OF PLAINTIFF IN ERROR

W. H. PLUMMER *and*
HENRY JACKSON DARBY,
Attorneys for Plaintiff in Error.
Spokane, Washington.

STATEMENT.

The writ of error in this case brings up for review the action of the lower Court in sustaining the demurrers of defendants to the amended complaint, and dismissing plaintiff's action.

The demurrers are identical, and set up but *one ground,* namely, that the complaint does not state sufficient facts to constitute a cause of action.

The defendants' demurrers were to the original complaint. Thereafter an amended complaint was filed, and it was agreed that the original demurrers should stand as demurrers to the amended complaint.

The complaint, so far as material to this appeal, alleges, in substance, that Lamphere was a locomotive fireman in the employ of the defendant Oregon Railroad & Navigation Company; that his duties required him to respond at any time when ordered so to do; that on December 1, 1910, at about 7:15 p. m., he was ordered by defendant to proceed from his home to the depot, secure proper transportation, board an interstate train which was due at 7:45 p. m., and proceed to a certain town, and (as stated by the Court in its opinion, R. p. 12) relieve an engine crew which had been continuously employed for more than sixteen hours on an engine hauling an interstate train.

That after receiving said order, Lamphere, in the performance of his duties, hastened to the depot of the

company, and had reached a crossing in the yards of defendant where the cars were cut, when without warning they were suddenly closed by reason of other cars being carelessly and negligently kicked against the cars on the north side of said crossing, and that Lamphere sustained injuries which resulted in his death; that Lamphere at the time of sustaining his injuries and the persons who caused his death, were employed by defendant in its interstate business, and that at all times mentioned in the complaint Lamphere was doing exclu sively things necessary in the performance of his duties, in obedience to orders, and which were in aid of, and made necessary by, the business of defendant as a common carrier of interstate commerce by railroad. (R. p. 2 et seq.) The complaint also alleges that after the accident the above-named defendant transferred all its property to the Oregon-Washington Railroad & Navigation Company, and that the said grantee assumed and agreed to pay all the obligations and liabilities of the grantor.

ASSIGNMENTS OF ERROR.

Plaintiff's Assignments of Error are two:

1. That the Court erred in sustaining the demurrers of defendants and in holding and deciding that the amended complaint does not state facts sufficient to constitute a cause of action.

2. That the Court erred in dismissing the action

of plaintiff and rendering judgment for defendants. (R. pp. 2-3-4.)

ARGUMENT.

The Court below held that decedent at the time of receiving his injuries was not protected by the Federal Employers' Liability Act; that he was killed through the negligence of fellow servants, and that said Act, which eliminates the defense of negligence of fellow servants, being inapplicable, no action could be maintained.

The conclusions of the eminent trial judge are stated with characteristic clearness. He says:

"For the purposes of this case, I deem it sufficient to say that a locomotive fireman is not, while on the way from his home to the depot, for the purpose of taking a train to a distant point, as a part of a dead-head crew, there to fire an engine hauling an interstate train, employed in interstate commerce. Indeed, he is not employed in commerce of any kind. His employment is only constructive at best, and such employment does not satisfy the requirements of this act." (R. pp. 19-20.)

The learned judge avoided the unfortunate expression which has been used by some of the Courts in construing the Employers' Liability Act. The employee not only does not *engage* in interstate commerce, but, as *an employee,* it is impossible for him to *engage* in it, by railroad, or otherwise. He may put fuel into his engine, he may switch cars, load or unload interstate freight.

drive an engine hauling an interstate train, or be otherwise *engaged* in the performance of his particular functions. But he is never, as an employee, engaged in interstate commerce. *This is done, and can only be done by the master.* The master, *while engaging* in the business of interstate commerce by railroad, *employs* firemen, engineers, brakemen and other persons. These persons *engage* in the discharge of their duties, or in their respective trades, and are *employed* by the master in carrying on his business of interstate commerce.

The Act applies to common carriers by railroad while engaging in interstate commerce, and to persons employed by them in such commerce.

All this is not only implicit in the declaration of the Court, that Lamphere, at the time of sustaining his injuries, was not "*employed* in interstate commerce," but may be easily deduced from the Act. Indeed, the Act itself so states in unequivocal terms.

Therefore, what we must first determine is, Was decedent, at the time he sustained his injuries, *employed* by defendant in interstate commerce?

The Employers' Liability Act of 1908 (35 U. S. Stat. at L. 65, c 149), is entitled "An Act relating to the liability of Common Carriers by railroad to their employees in certain cases."

Section 1 of said Act provides:

"That every common carrier by railroad *while engaging* in commerce between any of the several States or Territories * * * shall be liable in damages to *any* person suffering injury *while he is EMPLOYED by such carrier in such commerce,* or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

As before stated, it is apparent that the employee does not *engage* in interstate commerce. It is the *master* who engages in such commerce. "* * * every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable, etc."

The person injured need only be employed, i. e., USED, *by the carrier in carrying on its business of interstate commerce.* That is to say, the servant at the time of his injury must be doing something for the master which relates to, is connected with, or which is in aid of, the interstate business of the master. If at the time of an injury the servant is performing duties which relate solely to *intra*state commerce, the Act does not apply. But if at the time he is part of the

vast machinery necessary to carry on *inter*state commerce, the Act does apply.

This conclusion is rendered unescapable by a consideration of the meaning of the word "employed". The word, as used in the Act, is the third person, singular number, present tense, *passive* voice, indicative mood, of the verb "employ."

In Webster's International Dictionary (Revised and Enlarged Edition of 1891, published by G. & C. Merriam & Co.), "Employ" is defined as follows:

"To *use;* to have in service; *to cause to be engaged in doing something;* * * * *to make use of* * * * *for a specific purpose;* to have or keep at work; to give employment or occupation to; *to intrust with some duty or behest.*"

In Murray's New English Dictionary, which is now being published under the auspices of the University of Oxford, the following definition is given:

"3. *To USE the service of* (*a person*) *in a professional capacity, or IN THE TRANSACTION OF SOME SPECIAL BUSINESS*: *to have or maintain* (*persons*) *in one's service.*"

Therefore, what Congress meant by the words "shall be liable in damages to any person suffering injury while he is EMPLOYED by such carrier in such commerce", was, that the carrier should be liable to *every* person suffering injury *while such person was*

used by the carrier, while he was in the service of the carrier, while he was engaged in doing something for the carrier, while he was made use of by the carrier, while he was performing some duty which had been required of him by such carrier, so long as the things done by the employee were in aid of, or incidental to, or necessary, expedient, or desirable in carrying on, the interstate business of such carrier.

Now let us see what is alleged in the complaint. In paragraph III., it is alleged:

"That at the time of the happening of the injury and death of C. Roy Lamphere, and immediately prior thereto, he was engaged in the performance of his duty in the employment of said Oregon Railroad & Navigation Company, and doing and performing exclusively the acts and things necessary and proper to be done in the performance of his said duties, in OBEDIENCE TO THE ORDER OF SAID COMPANY, AND AS A PART OF THE NECESSITIES AND REQUIREMENTS OF SAID COMPANY, IN AID OF, AND AS A PART OF THE OPERATION OF ITS CARS, ENGINES AND TRAINS IN CARRYING ON ITS BUSINESS OF INTERSTATE COMMERCE BY RAILROAD." (R. p. 3.)

In paragraph VII. it is alleged that decedent was at the time of the injury, and for a long time prior thereto, had been, a locomotive fireman in the employ of the Oregon Railroad & Navigation Company, and that *"his duties as such fireman required him to respond at any time of the day or night when he should be called upon*

by said company to perform any of his duties assigned him from time to time.'' (R. p. 5.)

In paragraph IX., it is alleged:

''That on said first day of December, 1910, *at about* 7:15 *p. m. of said day, in said town of Tekoa, Washington, said defendant ordered said Lamphere to proceed from his home to said passenger station and there secure proper transportation and go aboard Train No. 3. which train was due at* 7:45 *p. m. of said day, and was an INTERSTATE train, and proceed upon said train to Spokane, Washington, and relieve the fireman on Engine No.* 522, *WHICH ENGINE WAS PULLING A TRAIN OF CARS ENGAGED AT THE TIME IN INTERSTATE COMMERCE BY RAILROAD.''* (R. pp. 5-6.)

(Tekoa, Washington, is a division point of the Company. An immaterial mistake was made by the stenographer in transcribing her notes. Decedent was not to go to Spokane, but to a small town west of Tekoa, for the purpose, as stated in the opinion of the Court (R. p. 12), of relieving *''an engine crew which had been constantly employed for more than sixteen hours on an engine hauling an interstate train.''*)

In paragraph X it is alleged that:

''That immediately after receiving said order mentioned in the preceding paragraph herein, said Lamphere immediately left his home and proceeded toward said railway station, for the purpose of obeying said orders and getting upon said train to relieve the said fireman as aforesaid, and for that purpose *he proceeded along and upon said footpath upon and across the yard of said company, in the performance of his said duties, and for the purpose of, and as one of the necessary acts*

in performing his duty as a fireman for said company in its service in carrying on its business of an interstate common carrier by railroad.'' (R. p. 6.)

And then it is alleged that while on his way to the depot and while using a footpath across the company's tracks, which was used by the company's employees, and by the public generally, and where the company always cut the cars for the passage of pedestrians, the company, without giving any warning of its intention so to do, suddenly, carelessly, recklessly and negligently kicked other cars against the cars next to the crossing and crushed decedent; that no bell was rung or whistle sounded; that no flagman was at this crossing *which was used by decedent and other employees of the company in the performance of their duties* and the general public of Tekoa, and vicinity; that the crossing above referred to was the crossing used by decedent and citizens generally in going from the west side of Tekoa where decedent resided to the railway station of defendant.

Was not the decedent USED by the defendant in carrying on its business of interstate commerce. Are not sufficient facts alleged which if true (and they must be taken as true when subjected to demurrer) would entitle plaintiff to recover?

An interstate train must be moved; the crew hauling such train can work no longer, or the defendant will be liable to heavy penalties; *defendant's duties required*

him to respond at any hour of the day or night; the master orders him to leave his home and wife and baby, and to bring the train forward. Obedient to defendant's command he starts out in the performance of his duty. What duty? For what purpose? *For the purpose of bringing an interstate train on to its destination.* Was he not USED by the carrier in interstate commerce? Was he not injured while he was in the service of the carrier, and in the performance of duties in aid of interstate commerce? Was he not doing something for the carrier, something necessary to carrying on its business of interstate commerce? Was he not injured while performing a duty which had been required of him by such carrier, *and did not that duty, as alleged in the complaint, relate exclusively to, and was it not made necessary by, the interstate business of the carrier?* If not, to what kind of business? *Intrastate?* There is not a single word in the complaint about *intra*state business or commerce. *The train which plaintiff was to board was an interstate train; the train on which he was to work was an interstate train; the train by which he was killed was engaged in interstate commerce.* He was obeying the command of the master. The work in hand was to bring this interstate train on to its destination. He was told to help in this work. And to bring this train on, it was just as necessary that decedent should go to the depot and get his pass, as it would have been for him to put coal into the furnace of the engine after

he should have boarded it, had he not been killed. He was one of the means used by the master to move this interstate train. The master decided upon what was necessary to be done, issued the necessary orders, and when decedent met his death, he was acting in obedience to the same.

In the brief which defendants submitted to the lower Court appear the following words:

"Keep in mind the thought that the Act was passed for the benefit of train crews while engaged in moving trains carrying interstate freight. The particular hazard connected with this kind of work is what prompted the passing of the Act. Under the allegations of the complaint, the employee was not at the time of his death engaged in interstate commerce within the contemplation of the Act * * *."

If the Act was passed merely for the benefit of train crews while engaged in moving trains carrying interstate freight, Congress certainly chose inapt words wherewith to express its will.

The original Employers' Liability Act of 1906 (34 Stat. at L. 232, c. 3073) provided, among other things, that *every* common carrier *engaged in interstate commerce* "shall be liable to ANY of its employees, or, in case of his death, to his personal representative * * * for all damages, etc." Congress showed no disposition there to protect only train crews engaged in moving trains carrying interstate freight.

As we all know, this Act was held unconstitutional for the reason that it applied to persons employed by the master in *intra*state commerce, as well as persons employed in *inter*state commerce. In short, to persons at times when they could not possibly have any connection with the interstate business of the carrier.

Congress immediately thereafter passed the Act of 1908. Does it say that only train crews injured while engaged in moving trains carrying interstate freight may recover damages of the carrier? Not at all.

It says that "every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to *any* person suffering injury while he is EMPLOYED by *such carrier in such commerce,* or, in case of the death of such employee, to his or her personal representative * * *."

The Court below evidently accepted the view urged by defendants. True, it held that decedent at the time of his death was not "employed in interstate commerce. Indeed, * * * not employed in commerce of any kind." But what meaning the Court gave to the word "employed" is not clear. Certainly not the one given by the authorities, philological or juridical.

And, as heretofore pointed out, it is necessary only that the *master* be *engaged* in interstate commerce, by

railroad, and that the *servant* be *employed,* i. e., *used,* by the master in such commerce. In order to carry on interstate commerce by railroad a carrier must have shops where its engines and cars are housed and repaired; it must have men to keep its tracks and roadbed safe; it must have men to provide water and fuel at different points for its engines; it must have train dispatchers to direct the movements of its trains, and telegraphers to receive and transmit their orders; it must have yard-masters and switching crews; it must have warehouses within which to store the commodities which it hauls, and men to guard, and load and unload the same; it must have baggage clerks, and car inspectors and freight and passenger agents, and machinists and truckers, and mechanics, and flagmen, and call-boys, and watchmen, and station masters and division superintendents, as well as train crews to move its trains. They are all equipollent. One is just as necessary as the other. And if the different members, or different departments, of an interstate carrier should rebel, one against the other, as the several members of the Body once rebelled against the Belly, Interstate Commerce, likewise, would soon languish.

To illustrate: Suppose the switching crews should go on a strike? Within forty-eight hours the freight yards would be congested with a vast congeries of cars

containing merchandise destined to all points of the globe. Interstate commerce would come to a dead stop. Suppose that the section-hands and track-walkers should refuse to work, and that other men could not be secured to take their place? It would not be long before a carrier would not dare to send out a single train, for fear of disaster. Suppose the telegraphers should strike? Could interstate commerce be carried on? Suppose the truckmen in freight depots, or machinists in the car-shops, should refuse any longer to work? Would Interstate Commerce continue to be *interstate,* or even *commerce,* for very long? Innocuous desuetude were "the strenuous life" compared with the stagnation which would result. Prometheus would be bound! Or, rather, *Gulliver*—and by pigmies!

Interstate commerce is a vast plexus of interweaving activities. It is the summation of the manifold and multiform acts of myriads of men. It is an organism, just as the Body is an organism, just as Society is an organism. It, too, is dynamic, not static. It, also, has had its evolution. Like Man, Interstate Commerce has developed from a simple organism into a marvelously complex one. Like Society, it is now a work of co-operation. Division of Labor has been made necessary. Differentiation has been at work. The power of Congress over Interstate Commerce has at all times been unlimited. (In re Debs, 158 U. S. 564, 590; Sherlock v.

Alling, 93 U. S. 99; Gibbons v. Ogden, 9 Wheat. 1 (6 L. Ed. 23); Baltimore & O. R. Co. v. Baugh, 149 U. S. 368; Adair v. United States, 208 U. S. 161, 178; U. S. v. Freight Asso., 166 U. S. 290; Gloucester F. Co. v. Penna., 114 U. S. 203; Baltimore & O. R. Co. v. Interstate Commerce Com., 221 U. S. 612.) Congress knowing all this, and desiring, as stated by the Court below, "to exert its authority over the subject matter * * * to the fullest extent" (R. p. 18), decreed,

"That every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to *any* person suffering injury while he is *employed* by such carrier in such commerce * * *."

Could more apt words be employed? We call the especial attention of the Court to the fact that "Employed" as used in the Act is in the *passive* voice. This renders the construction contended for by us ineluctable.

It is a well known rule that any construction which would operate unjustly or lead to absurd results, must be rejected. And would it not operate unjustly to protect only a small number of the persons employed by a common carrier in interstate commerce, (train crews engaged in moving trains), and leave unprotected the vast army of men whose efforts are just as necessary to the carrying on of interstate business as are the activities of train crews? Why not include them also? *They are held to be fellow servants of train crews when*

maimed, or injured or killed by the negligence of train crews.

Although the two following cases properly belong to another division of the subject, we cannot refrain from calling them to the attention of the Court at this time.

In the case of Mobile, Jackson & K. C. R. R. Co. v. Turnipseed, Admr., 219 U. S. 35, the Mississippi Code, which reads, "*Every* employee of a railroad corporation," was construed, and held to apply to a section foreman, against the contention of plaintiff in error that the statute was not applicable to "an employee not subject to any danger or peril peculiar to the *operation* of railway trains."

The Employers' Liability Act provides that every common carrier by railroad while engaging in interstate commerce "shall be liable in damages to ANY person suffering injury while he is employed by such carrier in such commerce." The terms of the latter Act are just as broad, so far as the persons used by the carrier in its interstate business is concerned, as the Mississippi statute.

See also L. & N. Railroad v. Melton, 218 U. S. 36, where the employee was a carpenter, and where, notwithstanding that prior to the decision of the Supreme Court of the United States, the Supreme Court of the

State of Indiana, upon the theory that in order to save the statute in question from being declared repugnant to the equality clause of the State Constitution and the 14th Amendment, had held that the statute must be restricted to employees engaged in train service, the Supreme Court of the United States held that the statute did not violate the 14th Amendment, *and affirmed the decision.* This, of course, it would not have done, if in its opinion such a construction was obnoxious to the equality clause of the State Constitution. The questions raised under the equality clause of a State Constitution can have no bearing upon a federal statute, especially a statute relating to Interstate Commerce. The power of Congress over Interstate Commerce, the persons and instrumentalities used (or employed) therein, is supreme. With the wisdom or policy of any statute relating to it, the Courts have nothing to do. The only question (and that is no longer a question) is, what power has Congress over the subject matter? There is no limitation expressed in the Constitution, and the Courts have imposed none by construction. Therefore, in view of the two decisions above mentioned, it must follow that the Supreme Court of the United States will give the Employers' Liability Act a construction which shall include "*any* person suffering injury while he is employed by such carrier in such commerce," and that it will not limit the application of the Act solely

to persons engaged in the immediate operation of trains, or subject to the hazards peculiar thereto.

And another thing. To refute the contention that it was the purpose of Congress in passing the Act to protect solely train crews engaged in moving trains carrying interstate commerce, it is sufficient to refer to the following Acts of Congress:

The original Safety Appliance Act was passed in 1893. It might be contended with some degree of plausibility that the purpose of Congress in passing this Act was to protect solely employees engaged in moving trains carrying interstate commerce, although it has received no such construction by the Courts. The Act was Amended in 1896, and again in 1903, and 1910.

In May, 1908, the Locomotive Ash Pan Act (35 U. S. Stat. at L. 476, c. 225) was passed.

In March, 1907, the Hours of Service Act (34 U. S. Stat. at L. 913) was passed.

Most of the legislation above mentioned was passed anterior to the passage of the Employers' Liability Act of 1908.

The Acts above mentioned affect largely the safety of persons engaged in moving trains carrying interstate commerce. But complete justice had not yet been done. There were other employees who needed protection. And in response to the economic needs of the time, Con-

gress passed the Employers' Liability Act. Its purpose, as heretofore stated, was to protect *every* employee of an interstate carrier by railroad when injured while doing things relating to, in aid of, or connected with, the interstate business of the master.

Another reason has just occurred to us. If it was the purpose of Congress to protect solely the persons subject to the hazards peculiar to train operation, why did it not say "or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, track, or roadbed"? For what purpose was the concluding part of Section 1 of said Act made to read "or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, *machinery,* track, roadbed, *works, boats, wharves, or other equipment"?* Indeed, the language used in the Act of 1908 is broader than that used in the Act of 1906. The Act of 1906 did not have the words, "boats, wharves, or other equipment" in it. Were not the terms "appliances", "works", "or other equipment" intended to include the machine-shops, the roundhouses, and the "machinery" used therein, as well as many other places and things? And what about defects or insufficiencies, due to its negligence, in its "boats", or "wharves"?

And why provide that the carrier "shall be liable in damages to *any* person suffering injury * * *"? Why did not the Act read "shall be liable to any member

of a train crew''; or ''any person employed on trains''; or ''any engineer, fireman, brakeman, flagman, conductor, or person or persons employed on trains, or engaged as a member of a train crew in the movement or operation thereof''?

One more reason, why the Act, without doing violence to its plain meaning and express terms, cannot be given the narrow construction contended for by defendants: In Barrett v. City of New York, et al., 189 Fed. 268, it was held that where express companies took packages of merchandise coming from other states at railroad or steamer terminals and transported them by wagon through the streets and avenues of New York to the addresses, such business was a part of interstate commerce, and being such, was within the exclusive jurisdiction of the federal government, and not subject to city ordinances licensing the business of expressmen within the city.

Now, it is a well known fact that many railroads, like the Northern Pacific Railway Co., instead of hauling cars for other express companies, conduct, as a part of their business, an express department. Certainly a driver of an express wagon if injured through the negligence ''of any of the officers, agents, or employees of such carrier, or by reason of any *defect* or *insufficiency*, due to its negligence, in its *cars* * * * *appliances, machinery* * * * *or other equipment*'' (which

would include his express wagon and harness, or a motor-driven carriage, if used)—if such an expressman should be injured while in the performance of his duties, he certainly would be "*employed* by such carrier in such commerce", and he would not be injured in the operation of any train, nor would his employment subject him the hazards peculiar to train service. Many other instances, reasons and rules deduced from other authorities might be urged. We will not, however, detain the Court any longer with this phase of the case.

We will now notice a few cases which have arisen under the Act.

EMPLOYERS' LIABILITY ACT DECISIONS.

In the case of Zikos v. Oregon R. & Navigation Co., 179 Fed. 893, plaintiff was injured while repairing the main line of defendant's railroad. On pages 897, 898, Whitson, J., says:

"Giving full scope to the power of Congress over interstate commerce, and admitting sufficient breadth of the Act to include the right to regulate the relations of employer and employee while each is engaged in such commerce, still it is contended that it appears from the complaint that the plaintiff was not so engaged; that repairing the track wholly within the state is in no sense within that term. But the track of a railroad company engaged both in interstate and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. Where

the traffic itself is not in fact interstate, although upon a railroad engaged in commerce between the states, such as trains devoted entirely to local business and wholly within the boundaries of a state, a different case is presented. There it is possible to identify what is and what is not interstate; but where, as in this case, a road is admittedly engaged in both, it becomes impossible to say that particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both. To hold, then, that a workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the states—to deny the power of Congress over interstate commerce—but that the power extends to the control of those instrumentalities through which such commerce is carried on is not an open question. Having reference to that phase of the subject, the Supreme Court has said:

" 'That assumption is this: That commerce, in the constitutional sense, only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on—a doctrine the unsoundness of which has been apparent ever since the decision in Gibbons v. Ogden, 9 Wheat. 1 (6 L. Ed. 23), and which has not since been open to question.' Interstate Commerce Commission v. Illinois Central Railroad Co., 215 U. S. 452, 30 Sup. Ct. 155, 161, 54 L. Ed.—

" 'The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and

encouraged.' Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 5 Sup. Ct. 826, 828, 29 L. Ed. 158.

" 'Commerce is a term of the largest import * * * the power to regulate it embraces all the instruments by which said commerce may be conducted.' Weldon v. State of Missouri, 91 U. S. 275, 280, 23 L. Ed. 347. * * *

"But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other. The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject-matter whenever a carrier is using the track for the double purpose."

In the case of Colasurdo v. Central R. R. of New Jersey, 180 Fed. 832, plaintiff, a railroad trackman, was assisting other employees in the repair of a switch in a railroad yard at night, when he was struck and injured by certain cars negligently kicked along the track with-

out light or warning. The Court held that he was within the protection of the Act. On pp. 836, 837-8, Hand, J., says:

"The remaining question is of the application of the Act of 1908, and that turns on whether the plaintiff was employed in interstate commerce. The Act in question was passed after the decision of the Supreme Court in the Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 287, in which a similar act was declared unconstitutional by a divided court, because it applied generally to all carriers engaged in interstate commerce, regardless of whether or not the particular act was in interstate commerce. Some questions, however, were decided by the whole court in those cases, and one of these was that the act was not unconstitutional because it regulated the relation of master and servant; all the justices recognizing that Congress might regulate those relations while the master and servant were employed in interstate commerce. The present act was clearly passed to meet the objection of that decision, and *I think it should therefore be construed as intending to include within the term 'person employed in such commerce' all those persons who could be so included within the constitutional power of Congress; that is to say, the act meant to include everybody whom Congress could include.* Under this construction the inquiry becomes whether Congress could constitutionally have passed a statute regulating the relation between a carrier-master and a servant who engaged in the repair of a track used both for interstate and intrastate commerce. Preliminarily the distinction should be noted that the act will not necessarily apply to the same person in all details of his employment. One man might have duties including both interstate and intrastate commerce, and he

would be subject to the act while engaged in one and not the other. This being so, the question is whether his repairing of a switch is such employment, when the switch is used indifferently in both kinds of commerce. *Suppose the track had crossed a corner of a state, and there was only one station within that state so that all trains crossing over that track must necessarily be engaged in interstate commerce. Would not a track worker engaged in the repair of such a track be engaged in interstate commerce? I do not think that he would be any the less so engaged than the engineer on the locomotive or the train despatcher who kept the trains at motive or the train dispatcher who kept the trains at proper intervals for safety. Of course, it is not necessary that the man must personally cross a state line. If the repair of such a track be interstate commerce, does it cease to be such because there are two stations within the state and some of the trains start at one and stop at the other?* I cannot think that this is true, although counsel have referred me to no case upon the subject and I have found none. The track is none the less *used* for interstate commerce, because it is also *used* for intrastate commerce, *and the person who repairs it is, I think, employed in each kind of commerce at the same time.*

"Despite the earlier ruling in Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, it has in recent times been stated several times by the Supreme Court that state statutes may indirectly regulate interstate commerce, even though Congress may at any time itself under its proper constitutional power enact a provision of directly opposite tenor. Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819; Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108. If, as was held in those cases, a state has the power to regulate such commerce until Congress intervenes, because it is as well within the state's proper

powers, must not the corollary be true as well, that Congress may intervene, even when the effect of that intervention be incidentally the regulation of intrastate commerce as well? Could not Congress, for example, provide that all tracks used in interstate commerce must be of a standard width and weight? Would that not affect all tracks used in such commerce, although they likewise were used for intrastate commerce? Of course, any one could use any other tracks he choose for intrastate commerce; but it can surely not be a ground to limit Congress' proper powers that the track has a joint use. If so, the repair of such tracks must be a part of interstate commerce, and under the Employer's Liability Cases, supra, the relations of master and servant arising between the railroad and its employees engaged in repairing the track are similarly within the power of Congress.

"I am therefore of opinion that the plaintiff was at the time engaged in interstate commerce and entitled to the rights secured by this act. That being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not. It is true that the act is applicable to carriers only 'while engaged' in interstate commerce, but that includes their activity when they are engaging in such commerce by their own employees. In short, if the employee was engaged in such commerce, so was the road, for the road was the master, and the servant's act its act. The statute does not say that the injury must arise from an act itself done in interstate commerce, nor can I see any reason for such an implied construction."

In the case of Johnson v. Great Northern Ry. Co., 178 Fed. 643 (102 C. C. A. 89), plaintiff was a car repairer, upon tracks in defendant's railroad yards in

the City of Minneapolis. On the date of the injury plaintiff was assigned to do the work of one Burns, whose duty it was to couple up the air hose and make such light repairs as could be done upon the switching track. While between two cars plaintiff was injured by reason of their being moved without warning. On page 648 the Court say:

"Again, we think the facts bring the case within the provisions of Act of Congress April 22nd, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1172), known as the 'Employers' Liability Act', as the defendant, in moving the car in question, was engaged in interstate commerce, plaintiff was employed by such carrier, in said commerce, and the proximate cause of the injury was the defective condition of the coupling pin. * * *

"It is argued that the Employers' Liability Act can have no application to the case, as plaintiff was not an employee engaged in interstate commerce. A part of his employment was to see to the coupling of the cars and the air hose upon the cars which were placed upon the transfer tracks. Some of those cars, among them the one in question, were engaged in interstate commerce. It is difficult to see why he was not an employee engaged in the movement of interstate commerce to as full an extent as a switchman engaged in the making up of trains in the railroad yards, as in the case of Chicago Junction R. Co. v. King, supra."

Mr. Doherty, in his admirable work entitled "Liability of Railroads to Interstate Employees", discusses the application of the Act.

He says:

"The crew of an interstate train is of course included. A switchman engaged in duty, as such, for an interstate train, a freight handler while employed in handling interstate or foreign freight, and mechanics or car repair men, while engaged in work upon interstate cars or other interstate instrumentalities, *and while passing over the road for the purpose of making repairs upon cars or engines of an interstate train are also included,* and emergency or wrecking crews while at work upon *any* train on an interstate highway may reasonably be included.

"IN OTHER WORDS, ALL WHO ARE AT THE TIME OF INJURY ENGAGED IN DUTY WHICH HAS DIRECT RELATION TO THE INTERSTATE BUSINESS OF THE CARRIER ARE ENTITLED TO THE PROTECTION OF THE ACT.

"*The act may fairly be interpreted to include all mechanics who are engaged at the time of injury upon instrumentalities which are generally and indiscriminately used for all the purposes of an interstate railroad, as, for instance, linemen, track repairers and laborers engaged in the general maintenance of the interstate highway, of its signal wires or apparatus, and those whose duties relate to the construction, maintenance, and repair of those instrumentalities which are used in the business conducted by the interstate railroad without discrimination between the local or interstate character of its traffic.* Snead v. Central of Georgia Ry. Co., 151 Fed. Rep. 608.

"These general terms include the vast majority of the employees of an interstate railroad who may be affected by peril or accident, for, as railroads are practically conducted, there are few employees whose duty

is so purely local that they have no relation to interstate traffic.

"This interpretation of the act is sustained in the case of Johnson v. Great Northern Ry. Co., 178 Fed. Rep. 643, in the Circuit Court of Appeals for the Eighth Circuit."

On page 87 it is said:

"Terminal charges have been held to be within the regulative power of Congress, therefore it may fairly be concluded that yardmen at terminals where local and interstate traffic cars are commingled and generally handled without discrimination, are engaged in interstate commerce and are within the scope of the act.

"This has been expressly decided in Johnson v. Great Northern Ry. Co., 178 Fed. Rep. 643, citing Chicago Junction Ry. Co. v. King, 169 Fed. Rep. 372."

In this connection it may be noted that in the Hours of Service Act (34 U. S. Stat. at L. 1416, c. 2939), Congress has prohibited any operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements from being required or permitted to remain on duty for periods longer than those prescribed therein. And, of course, they also are within the protection of the Employers' Liability Act, notwithstanding the fact that they perform work which relates both to interstate and intrastate commerce.

In Missouri the injured servant must be engaged "*in the work of operating such railroad.*" In Callahan v. St. Louis Mer. B. T. R. Co., 170 Mo. 473, 60 L. R. A. 249, 71 S. W. 208, affirmed in 194 U. S. 628, 48 L. Ed. 1157, it was held that where certain workmen were on a trestle which crossed a street in St Louis and were throwing timbers down into the street, *an employee of the company, whose duty it was to warn pedestrians,* was entitled to recover for an injury received through the negligence of the workmen on the trestle, it being held that he was engaged in *operation* of the road.

Also a brakeman, in the discharge of his duties lighting lamps on a caboose, which was being switched so as to attach it to his train, when he was injured in a collision, was engaged in operating the railroad, St. Louis, etc. R. Co. v. Smith, 90 S. W. 926; also a section hand, whose duty it is to assist in repairing a track on a railroad, is engaged in operating a railroad, Thompson v. Chappell, 91 Mo. App. 297, and is within the protection of the statute while riding on a handcar and injured by the negligence of a fellow servant. Overton v. Chicago, etc. R. Co., 111 Mo. App. 613, 86 S. W. 503; Rice v. Wabash R. Co., 92 Mo. App. 35; see also Stubbs v. Omaha, etc. R. Co., 85 Mo. App. 192.

In Pittsburg, etc. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033, plaintiff was a passenger train *engi-*

neer and was standing between two railroad tracks where he had gone to take charge of his engine, when he was knocked down by another train of the company. It was held that the Indiana statute applied.

So, in Indianapolis U. Ry. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943, it was held that the statute applied to a *telegraph operator* stationed at a track junction, and *whose duties required him to cross the railroad tracks,* and who, while so doing, was struck by a train.

See also:

Missouri Ry. v. Mackey, 127 U. S. 206, 32 L. Ed. 107, affirming 33 Kan. 298, 6 Pac. 291.

Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. Ed. 332, affirming 93 Minn. 63, 100 N. W. 681.

Pittsburg R. R. Co. v. Ross, 169 Ind. 3, 80 N. E. 845.

Chicago, R. I. & P. R. R. v. Stahley, 62 Fed. 363 (opinion by Brewer, J.).

Haden v. Sioux City, etc. R., 92 Ia. 226, 60 N. W. 537.

Atchison, etc. R. Co. v. Vincent, 56 Kans. 344, 43 Pac. 251.

Rayburn v. Central Ia. R. Co., 74 Ia. 637, 35 N. W. 606, 38 N. W. 520.

Leier v. Minnesota Belt Line R., etc. Co., 63 Minn. 203, 65 N. W. 269.

Bain v. Northern Pacific R. Co., 120 Wis. 412, 98 N. W. 241.

The above decisions were in states where the wording of the statutes was, or the construction of the Courts had been, that only those employees who were subject to the hazards peculiar to the *operation* of railroads, might recover if injured through the negligence of fellow servants.

In other states the statutes have been given a more liberal construction and are held to apply to *all* employees.

Georgia R. Co. v. Miller, 90 Ga. 571, 16 S. E. 939.

Georgia R. Co. v. Brown, 86 Ga. 320, 12 S. E. 812.

Georgia R. Co. v. Ivery, 73 Ga. 499.

Mabry v. North Carolina R. Co., 52 S. E. 124.

Sigman v. Southern R. Co., 135 N. C. 181, 47 S. E. 420.

Mott v. Southern R. Co., 131 N. C. 234, 42 S. E. 601.

So, the Federal Statute, applying to *any* person employed by interstate carriers by railroad in such commerce, includes all employees, whether operating trains or not.

"EMPLOYED," AS DEFINED BY THE COURTS.

To return to the meaning of the word "Employed". Defendants must accept the definition urged by us, or a much broader one. We call the attention of the Court to the fact that some of the cases hereinafter referred to arose under penal statutes, where the strictest construction would be given to the language used.

In United States v. The Anjer Head, 46 Fed. 664, it is said that "Employed" as used in Act June 29, 1888, c. 496, Sec. 4, 25 Stat. 210 (U. S. Comp. Stat. 1901), p. 3536), providing that any boat or vessel used or employed in violating any provisions of the Act should be liable, etc.; means to MAKE USE OF; TO PUT TO A PURPOSE: that practically the words "used or employed" are synonymous.

So, likewise do we contend that decedent was *made use of* by the carrier, and, as pleaded in the complaint, that the use related exclusively to interstate business. That he was *"put to a purpose"*, and that purpose was the movement of an interstate train.

In King v. United States, 32 Court of Claims, 234, it is said that the word "employed", in Act May 24, 1888, c. 308, 25 Stat. 157 (U. S. Comp. Stat. 1901, p. 2637), declaring that eight hours shall constitute a day's work for letter carriers, and that if a carrier is *employed* a greater number of hours per day than eight, he shall

be paid extra, "means actual employment in the carrier's work or service, and does not extend to intervals, however brief, when the carrier has control of his time."

It will be remembered that the complaint alleges that decedent's "duties as such fireman required him to respond at any time of the day or night when he should be called upon by said company to perform any of his duties assigned him from time to time." (Paragraph VII. of Amended Complaint, R. p. 5.)

That in paragraph IX. it is alleged, "That on said first day of December, 1910, at about 7:15 p. m. of said day, in said town of Tekoa, Washington, said defendant ordered said Lamphere to proceed from his home to said passenger station and there secure proper transportation and go aboard Train No. 3, which train was due at 7:45 p. m. of said day, and was an INTERSTATE train and proceed upon said train to Spokane, Washington, and relieve the fireman on Engine No. 522, WHICH ENGINE WAS PULLING A TRAIN OF CARS ENGAGED AT THE TIME IN INTERSTATE COMMERCE BY RAILROAD."

That in paragraph X. it is alleged "That immediately after receiving said order mentioned in the preceding paragraph herein, said Lamphere immediately left his home and proceeded toward said railway station, for the purpose of obeying said orders and getting upon

said train to relieve the said fireman as aforesaid, and for that purpose he proceeded along and upon said foot-path upon and across the yard of said company, in the performance of his said duties, and for the purpose of, and as one of the necessary acts in performing his duty as a fireman for said company in its service in carrying on its business of an interstate common carrier by railroad."

Was not decedent actually employed in the carrier's work or service? Did not the duties being performed by him relate exclusively to interstate commerce? Did Lamphere after receiving the orders of the company have any control of *his time?—or actions?* Certainly not.

And in United States v. Catherine, 25 Fed. Cases 332, 338, it is said that "To be employed in anything means not only the act of doing it, *but also to be engaged to do it; to be under contract or orders to do it.*" And it was held that "employed", as used in the Act of Congress prohibiting any citizen of the United States to have any property in a vessel *employed* in transporting slaves, means not only the act of doing it, *but also to be engaged to do it, and that the chartering and fitting out of a vessel at Havana with design to have her perform a voyage then arranged for bringing slaves to the country brought the transaction within the prohibition of the Act.*

And so, in United States v. Morris, 39 U. S. (14 Pet.) 464, 475, 10 L. Ed. 543, Chief Justice Taney, speaking for the Court, said:

"The question in this case is, whether a vessel, on her outward voyage to the coast of Africa, for the purpose of taking on board a cargo of slaves, is 'employed or made use of' in the transportation or carrying of slaves from one foreign country or place to another, before any slaves are received on board. To be 'employed' in anything, means not only the act of doing it, *but also to be engaged to do it; to be under contract or orders to do it.* And this is not only the *ordinary* meaning of the word, but it has frequently been used in that sense in other Acts of Congress. (Citing instances.) * * * Again the Act of July 2nd, 1813, Sec. 8 (3 U. S. Stat. 4), declares that certain vessels 'employed' in the fisheries, shall not be entitled to the bounties therein granted, unless the master makes an agreement, in writing or in print, with every fisherman employed therein, before he proceeds on any fishing voyage. Here, the vessel is spoken of as 'employed' in the fisheries, before she sails on the voyage. * * *

"In like manner, the vessel in question was employed in the transportation of slaves, within the meaning of the Act of Congress of May 10th, 1800, if she was sailing on her outward voyage to the African coast, in order to take them on board, to be transported to another foreign country. In other words, she is employed in the slave-trade."

Can there be any doubt that Lamphere was *employed* by defendant in interstate commerce? Just as fitting out a vessel in order to carry slaves, just as

embarking on the outward voyage to receive a cargo of slaves, were preliminary and essential steps to the act of transporting them, so were the things done by decedent under the direction of the company, a part of, were connected with, were incidental to, were made necessary by, the interstate business of defendant. Decedent was not only under contract or orders to bring this interstate train forward, *but was at the time actually engaged in doing those things which were necessary to be done, and which if not done, the train could never be moved.*

And this brings us to other important and conclusive arguments in favor of plaintiff's contention.

SAFETY APPLIANCE DECISIONS.

We have seen that the word "employed" as used (or employed) in the Employers' Liability Act is synonymous with "used". In Section 2 of the Safety Appliance Act of 1893 (27 Stat. at L. 531, c. 196) common carriers are forbidden to "haul, or permit to be hauled *or used*" any car not equipped as in said Act provided.

In Section 4 of the Act they are forbidden "to *use* any car" not equipped as provided in said Act.

In Section 6 (Amendment April 1, 1896, 29 Stat. at L. 85) of the Act a penalty is imposed when any car is "hauled or *used*" in violation thereof.

The Amendment of 1903 (32 Stat. at L. 943, c. 976), applies "to all trains, locomotives, tenders, cars, and similar vehicles USED, etc."

In the case of Johnson v. Southern Pacific, 196 U. S. 1, 49 L. Ed. 363, plaintiff, a brakeman, had been injured while attempting to couple an engine to a dining car, *which was standing on a sidetrack*, for the purpose of turning the car around preparatory to its being picked up and put on the next west-bound passenger train. The Supreme Court, reversing both the Circuit Court of Appeals of the Eighth Circuit and the Circuit Court for the District of Utah, say:

"Counsel urges that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement, or being put into a train for such use, and Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475, is cited as supporting that contention. In Coe v. Errol it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former state before transportation had begun.

"The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable.

"*Confessedly this dining car was under the control*

of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

This in answer to the contention of counsel for the defendant that the mere intention to use an insolated car standing in a railroad yard for that purpose was insufficient to give it an interstate character.

Since the power of Congress to regulate commerce among the States is plenary, (Lottery Cases, 188 U. S. 321, 356), and the Constitution "authorizes legislation with respect to all the subjects of foreign and interstate commerce, *the persons engaged in it*" as well as "the instruments by which it is carried on" (Sherlock v. Alling, 93 U. S. 99), and the power over the instrumentalities is no greater than it is over the persons engaged therein, and the language employed (or used) in the different Acts are synonymous, and the facts in the case at bar are similar (Lamphere's duties requiring him to respond at any hour of the day or night to haul interstate trains, and at the time was doing what he had been ordered to do, and what he was doing relating exclusively to interstate business of the defendants), the Johnson case fairly bristles with analogies favorable to plaintiff.

The Court in that case also held that the decision of the Circuit Court of Appeals that the car was empty,

and for that reason was not being *used* in interstate commerce, was erroneous. It cited with approval Voelker v. Chicago, M. & St. P. R. Co., 116 Fed. 867, to that effect.

In Erie v. Russell, 183 Fed. 722, it was decided that a car was in *use* while standing on a side track; see also, Schlemmer v. Buffalo, R. & P. Ry. Co., 205 U. S. 1; United States v. St. Louis Southwestern Ry. Co. of Texas, 184 Fed. 28; St. Louis I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281; United States v. Northern Pacific Terminal Co. of Oregon, 144 Fed. 861, opinion by Wolverton, J., and the case of Southern Ry. Co. v. United States, decided October 30, 1911, Co-ops. Advance Sheet of Dec. 1, 1911, p. 2.

We desire now to notice another very important phase of the case.

FELLOW-SERVANT DECISIONS.

It is desirable first to distinguish the position taken by us in the Court below from the conclusions arrived at by the learned judge, who has unconsciously confused the two. In the course of his opinion, he says:

"*It was conceded on the argument, by counsel for both parties, that the deceased was killed through the negligence of his fellow-servants, and that the complaint states no ground of recovery at common law.* In view of this concession it is perhaps unnecessary to consider that phase of the case, but in any event the allegations

of the complaint clearly show that the deceased and the servants whose negligence caused his death were fellow-servants of a common master at the time of the injury, within the rule which has long prevailed in the federal courts." (R. p. 13.)

The position taken by us may be best explained by quoting from our trial brief, copies of which were handed to the Court and to counsel for defendants. This brief was in reply to defendants' trial brief, which had been served on us. On pages 6 and 7 appear the following words:

"Decedent was either engaged in interstate commerce or nothing. If in interstate commerce, the defense of injury by negligence of fellow-servant is of no avail. If not in interstate commerce, i. e., not in the service of defendant, he stands upon the same footing with (as) the public in general. The complaint states a cause of action in either event, and the demurrer should be overruled." This was said in summing up our case.

On page 1 of our trial brief the following language was used:

"On page 3 of defendants' brief the following remarkable statement is made:

" 'In answer to the question as to what the employee was engaged in, if not in interstate commerce, we say, not anything.'

"This, too, despite the fact that on pages 1 and 2 of said brief, defendant states that plaintiff may not recover because decedent was killed through the negligence of a fellow-servant! If decedent was not engaged

in *anything*, he could have been performing no duty that he owed to defendant. He was, therefore, on an equal footing with other members of the general public. And under the statutes of the State of Washington his personal representative may maintain an action against a person or corporation negligently causing his death."

In other words, our contention was that defendants could not eat their cake and have it. That they must take one position or the other, and accept with the one taken all the consequences flowing therefrom. If benefits, also obligations. That they could not avail themselves of the advantages of both positions, and incur the responsibilities of neither.

From what has been said we think the antinomies of the Court's decision have been made apparent.

In the case of Fletcher v. Baltimore and Potomac R. R. Co., 168 U. S. 135, 138, the Court say:

"*The plaintiff at the time of the accident had finished his employment for the day, and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have. The liability of the defendant to the plaintiff for the act in question is not to be gauged by the law applicable to fellow-servants, where the negligence of one fellow-servant by which another is injured imposes no liability upon the common employer. The facts existing at the time of the happening of this accident do not bring it within the rule.* A railroad company is bound to use ordinary care and caution to avoid persons or property which may be near its track. This is elementary."

In Orman v. Salvo, 117 Fed. 233, 54 C. C. A. 265, it is said:

"The argument principally relied on by defendants' counsel—namely, that if the plaintiff was not warned of the coming danger, the failure to give such warning was the negligence of a fellow-servant—cannot be maintained upon the pleadings and evidence in this case. *To permit the application of the fellow-servant doctrine, the injured servant must at the time of the injury not only be serving the same master, but be engaged in the same employment with the negligent servant who caused the injury.* Wood, Mast. & Serv., Sec. 435. The answer admits that defendants furnished the tent for boarding their employees, and for their lodging, and that it was the custom and rule of defendants to have one of their employees warn every one in the vicinity of blast of the fact that it was about to be discharged, and that plaintiff was at the time of this blast in the tent resting beween intervals of labor. * * * *Plaintiff occupied the tent, not as a boarder or tenant, but as a servant of the defendants, and his board and lodging was received in part compensation for his services.* Wood, Mast. & Serv., Sec. 155. But while engaged at his meals or wrapped in slumber *he was performing no services for the master, and being in the performance of no employment,* but obtaining and enjoying compensation from the master, *he was not during such time the fellow-servant of any of the employees who were at work, about which he was in no way engaged or assisting.* He was not in the condition of a servant who is being conveyed in a car to his work, but was as much separated from it as if he had been sleeping in his home a mile away."

In Sullivan v. New York, N. H. & H. R. Co. (Conn.), 47 Atl. 131, it was held that where deceased was a section foreman of defendant railroad company, but was injured after working hours while on a crossing, the

company's duty towards him was the same as a stranger, and hence it could not avail itself of the rule that an employer is not liable for an injury to an employee through the misconduct of a fellow-servant.

So, in Washburn v. Nashville & C. R. Co., 40 Tenn. 485, 488, 3 Head. 639, 643, it is said:

"But the instructions are erroneous in another respect. The principle stated above (fellow-servant rule), does not apply '*Where the servant was not, at the time of the injury, acting in the service of the master.* In such case, the servant injured is substantially a stranger, and entitled to all the privileges he would have had, if he had not been a servant'. 6 Eng. Cases, 580, cited in 1 Am. Law. Rep. Cases, 568, in note."

In the case of Tingley v. Long Island R. Co., 96 N. Y. Sup. 865, it was held that,

"The employment of a physician by a railroad, under a contract by which the physician agrees to *attend employees and passengers of the railroad* when called upon to do so, *does not* make the physician a fellow-servant with railroad operatives by whose negligence the physician is killed while crossing the railroad's tracks on his way to the station to take a train to attend *one of his own* patients."

See also, Baltimore & O. R. Co. v. State, 33 Md. 542, where a track-walker going home after work upon the tracks of defendant was not at that time an employee; also Columbus & T. R. Co. v. O'Brien, 4 Ohio C. C. 515, to same effect. Also, Louisville, etc. R. v. Wade (Fla.), 35 So. 863, and The Titan, 23 Fed. 413, 23 Blatchf. 177.

The case of Dishon v. Cincinnati, N. O. & T. Ry. Co., 126 Fed. 194, is not in point. The case was affirmed in 133 Fed. 471, 66 C. C. A. 345, *on the ground of contributory negligence,* but the Court intimated that in view of the case of Ellsworth v. Metheny, 104 Fed. 119, 44 C. C. A. 484, the holding of the lower Court that decedent was still in the course of his employment (and therefore, a fellow-servant of those who killed him) was erroneous.

The determinant factor is always, whether at the time of injury the servant is performing services for the master. This determines whether he was or was not a fellow servant of the persons injuring him. *On principle, there is no difference between an employee being killed on a public highway* while going from his work to his home (as in the Fletcher case, 168 U. S. 135), *and an employee being killed on a public highway while going from his home to his work.* And the Court will remember that it is alleged in the complaint:

"That on, to-wit: the 1st day of December, 1910, said *company provided and maintained across its numerous tracks near the north end of its passenger station, a certain footpath, extending from a footbridge situated on the west side of said yard, across said tracks past the north end of its passenger station connecting with one of the principal thoroughfares in the said city on the east side of said yard, which footpath was on said day, and had been for a number of years prior thereto, used continuously* by some of the employees of said com-

pany, including said C. Roy Lamphere, in the performance of their duties, *and other pedestrians, commonly, generally and notoriously, in walking from a west side portion of said town to said passenger station and other parts of said town.*" (Paragraph VI. of Complaint, R. p. 4.)

In Paragraph VIII. of the Complaint (R., p. 5), it is alleged:

"That said footpath crossing said tracks and yard, as aforesaid, was so commonly and frequently used, as aforesaid, that said company and its employees operating, using and switching cars and making up trains in said yard, would so arrange said trains and cars, that an opening would always be left between the ends of the cars so as to provide a passage-way between said cars, upon said footpath, so as to enable said footpath to be used as aforesaid, and it was also the custom and practice of said company that before any of said cars on either side of said footpath would be coupled together or jammed together for any purpose, a brakeman, switchman or other employee would be placed upon said footpath crossing so as to warn pedestrians and other employees of said company and prevent injuries by the coming of said cars."

It requires no citation of authority that defendants would be liable to a stranger if killed on this crossing in the manner decedent was killed. The company recognized the right of the general public by cutting the cars at this point.

Now, as stated in Orman v. Salvo, 117 Fed 233, "*to permit the application of the fellow-servant doctrine,*

the injured servant must at the time of the injury not only be serving the master, but be engaged in the same employment with the negligent servant who caused the injury.''

As alleged in Paragraph XI. of the Complaint (R., pp. 6 and 7), the employees who killed plaintiff were *working for the defendants* (also, engaged in interstate commerce), and if decedent could not be *''serving the master''* or *''engaged in the same employment with the negligent servant who caused the injury''* until he should board his engine, then the fellow-servant doctrine does not apply. In that event, the complaint states a cause of action under the statutes of the State of Washington.

We think that, at least, the question of whether or not decedent was employed in interstate commerce. notwithstanding the facts were undisputed, should have been left for a jury. At any rate, the question of whether the relation of master and servant existed at the time should have been. The lower Court, in denying Lamphere the protection of the Employers' Liability Act, said that his *employment* was ''only constructive at best'' (R., p. 20). If *only constructive* (and therefore not sufficient to justify the application of the humane Employers' Liability Act), it should also continue to be *only constructive,* and therefore insufficient to justify the application of the cruel fellow-

servant doctrine. It should not be a mere rope of sand in the one instance, and a sempiternal chain in the other. In the language of the Supreme Court of the United States, "the defense at best was a narrow one, and, in our view, more technical than just."

In view of the fact that the accident occurred on the company's grounds, and at a place which was used not only by its employees in the performance of their duties, but by the general public as well, and the further fact that decedent was subject to call at any time and had been commanded by the master to do the things which he was engaged in doing when he met his death, the case of Packet Company v. McCue, 17 Wall. 508, applies. This case is referred to by the Court in Philadelphia, B. & W. R. Co. vs. Tucker, 35 App. D. C. 123, as follows:

"In Packet Company v. McCue, 17 Wall 508, a bystander was hired on a wharf to assist in loading a boat which was soon to sail. This man had been occasionally employed in such work. His services occupied about two and one-half hours, *when he was directed to go to 'the office,'* which was on the boat, and get his pay. This he did and then attempted to go ashore. While on the gang-plank the plank was recklessly pulled from under his feet and he was thrown against the dock, receiving injuries from which he died. *Owing to the somewhat peculiar nature of the case it was held that it was for the jury to say, although the facts were undisputed, whether the relationship of master and servant existed until the man got completely ashore.* The

concluding sentence of the opinion of Mr. Justice Davis was as follows: *'The defense at best was a narrow one, and, in our view, more technical than just.'* "

If, on the other hand, it be a fact that decedent at the time was a fellow-servant of the persons who killed him—that is, *serving the master*—it must necessarily follow that he was employed by the master in interstate commerce.

FURTHER OF FELLOW SERVANT DECISIONS.

In the case of Boldt v. New York Central Railroad Company, 18 N. Y. 432, "plaintiff was employed to labor in graveling and ballasting a new track, which was on the same road-bed with and about six feet distant from the old track, and was injured by a train of cars of the defendants running on the new track, on which no trains of cars had before been run."

At the time of the injury plaintiff was going from his home to his place of work. The Court held that he was injured through the negligence of fellow servants, and could not recover.

On page 434, Chief Justice Johnson, speaking for the Court, says:

"When the plaintiff was injured he was walking on the new track from his house to his work. *But he was in the defendants' employment and doing that which was essential to enabling him to discharge his particu*

lar duty, viz.: going to the spot where it was to be performed, and he was moreover going on the track where, except as the servant of the company he had no right to be. He was there as the employee of the company, and because he was such employee."

So in the case at bar, Lamphere was doing that which was essential to enabling *him* to discharge his particular duty, viz., *going to the spot where it was to be performed.* And what duty was it he was to perform? *To move an interstate train.* And what kind of train was he to board? *An interstate train?* And by what kind of train was he killed? *An interstate train.* Is there a single word in the complaint about *intra-state* commerce trains or business? No. He was, therefore, in the service of the master. He was in the employment of the defendant company. He was employed by defendant in interstate commerce.

But, says the Court below, Lamphere was killed through the negligence of fellow servants. How, we ask, *can a person be a fellow servant of the persons injuring him, unless he himself at the time of injury is performing a fellow service?*—something contemplated by his contract of employment? And if he was doing something contemplated by his contract of employment, he was *employed,* i. e., USED, by the defendant in carrying on its business of interstate commerce.

If decedent at the time of his death had been going

down-town after dinner to engage in a game of pool or billiards, or had been on his way to a theatre, the mere fact that he was in the *general employ* of the defendant would not have made him a fellow-servant of the persons who killed him. Why? *Because he would not have been doing anything contemplated by his contract of service. Because he would not have been doing anything which related to the business of the master.* He would have stood upon the same plane as any other member of the general public.

But here we have the anomalous condition of a Court's declaring that decedent was a fellow-servant, and not a fellow servant; that decedent, when killed, was in the line of his duty, and not in the line of his duty; that he was working for the company, and not working for the company; that he was being used in interstate commerce, and not being used in interstate commerce; that he was engaged in doing something, and not engaged in doing anything!

By holding that decedent was a fellow servant of those who killed him (*and the persons who killed him were engaged in interstate commerce*), plaintiff cannot prosecute an action under the state statutes giving a right of action for the negligent killing of one person by another. (See appendix.)

And then, despite the holding that when killed decedent was in the employ of the master, *and was doing*

things contemplated by his contract of employment—nay, which he had been commanded to do by the master—despite the fact that the master was an interstate carrier, and that the *duties of Lamphere, as pleaded in the complaint, related exclusively to interstate business of the master; that the train to be moved was an interstate train;* that it was on the main line of an interstate road over which there does not move a single train that is not engaged in interstate commerce—despite all these things, the Court then denies plaintiff the protection of the Employers' Liability Act, which eliminates the defense of negligence of fellow-servants.

The case at bar is much stronger than the Bolt case (18 N. Y. 432). On page 432 it is stated that Bolt "was walking, *early in the morning,* from his residence along the new track where he was to work, when he was overtaken and struck down.

He was merely reporting for the performance of his customary duties. So far as is shown by the opinion, he had ample time. There was no emergency. The master had not directly commanded him to report—had given him no orders whatsoever. He was not subject to call at any hour of the day or night. All that was required of him was to be on time at the place of operation. Still the Court held that the relation of master and servant existed at the time.

But decedent's duties as "fireman required him to respond at any time of the day or night." (R., p. 5.)

"At about 7:15 *P. M.*" he was ordered "*to proceed from his home* to said passenger station" and board Train No. 3, "which train was due at 7:45 *P. M.,*" and proceed to another town and relieve the fireman on Engine No. 522, which engine was pulling a train of cars engaged at the time in interstate commerce. The crew to be relieved could work no longer, or the master would be subject to heavy penalties.

Decedent was given only 30 minutes within which to change his clothes and get to the station. *Bolt's time was his own. Decedent's belonged to the company. At the time he was killed he was actively obeying his master's command. And the things which he was doing related wholly to the interstate business of the master. Was he not employed by the master in interstate commerce?* We think so.

Where an employee of a railroad, while returning from his dinner to his work, was injured by being struck by a passing train negligently run by the engineer, the servant was still in the master's service, and a fellow servant with the engineer of the train, at the time of the accident.

Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90.

It having been settled law for decades (in the absence of statutes eliminating the fellow-servant doctrine) that a servant on his way to work *was,* for all

practical purposes, *at work*, it ought not now (in the presence of such statutes) to be held that he is not. Especially, it should not be held that he is *not*, for the purpose of evading an Act abolishing the doctrine, and that he *is*, for the purpose of applying such doctrine.

Even conceding (for the purposes of orgument) that an employee must be *engaged* in interstate commerce, if it has been the law for generations that an employee on his way to work was in the master's service—was *engaged* in the work which he was on his way to perform—and this, too, regardless of whether there was an emergency, or whether he was at the time actively obeying orders or not—should it not now be held that a servant on his way (*in obedience to a command of the master*) to *engage* in interstate commerce, *is engaged* in it?

But, as heretofore pointed out, it is only necessary that the servant be USED by the master in interstate commerce. Decedent was so used, because at the time he was actively and diligently obeying the command of his master, and doing things in aid of, and which related exclusively to, the interstate business of defendant. He was, in short, "employed by such carrier in such commerce."

What effect would the death of a person who was not employed by defendant in interstate commerce have upon such commerce. Absolutely no effect whatsoever.

Therefore, if decedent was not employed by defendant in interstate commerce, if there existed no nexus between decedent and the interstate business of defendant, his death, though no person could be found in the wide world to perform the duties left unperformed by him, would make no difference whatsoever. Interstate commerce would not be affected in any way, not even for an instant. It would go on just the same. But decedent, in obedience to defendant's command, was on his way to bring an interstate train forward. The result which his death must have had, and did have, upon the movement of that interstate train, was to keep it standing until some one could be found to take his place. The time of movement of such train was in direct proportion to the time of finding such a man. If an hour, an hour; if a day, a day. It appears, then, that the movement of interstate commerce *did* bear some relation to decedent. Indeed, it bore so heavily upon him that it crushed him. It stood motionless until another was found to take his place—to finish the work which he left unfinished. *Then, and not until them, it moved!*

The case of Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, was an action brought under the Employers' Liability Act of 1906, which has been held constitutional as applied to the District of Columbia and the Territories. The opinion is interesting, exhaustive and logical. Say the Court:

"When Tucker was killed he was upon the premises of the defendant, in response to its call, to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage. Can it be that, under such circumstances, the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. In the present case, assuming for a moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he had entered the Annex, which was only another agency provided by the master for the accommodation of its servants."

This case on appeal was affirmed by the Supreme Court of the United States in Philadelphia, B. & W. R. Co. v. Tucker, 220 *U. S.* 608.

In St. Louis, A. & T. R. Co. v. Welch, 72 Texas, 298, 2 L. R. A. 839, 10 S. W. 529, it was held that the foreman of a bridge crew, who was asleep on a side-track in a car provided for that purpose, and *who was liable to be called at any moment to go out with his gang upon the road,* was on duty, so far as to be at the time a fellow servant of the men operating a freight train, by whose negligence he was injured.

See also:

Savannah, F. & W. R. Co. v. Chaney, 102 Ga. 841, 30 S. E. 437.

O'Brien v. Boston & A. R. Co., 138 Mass. 387.

Ewald v. Chicago & N. W. R. Co., 70 Wis. 420, 36 N. W. 12, 591.

Ryan v. Chicago & N. W. R. Co., 60 Ill. 171.

Taylor v. Bush & Sons, 61 Atl. 236, affirmed 66 Atl. 884.

O'Neil v. Pittsburg C. C. & St. L. R. Co., 130 Fed. 204.

Pendergast vs. Union Ry. Co., 41 N. Y. Sup. 927.

As pointed out in Willmarth v. Cordoza, 176 Fed. 1, 99 *C. C. A.* 475, *the test is, whether the relation of*

master and servant exists. And this has always been the determining factor whether the action involved the doctrine of assumed risk, the safe-place rule, or as in Willmarth v. Cordoza, the fellow-servant doctrine. As stated in the note to that case in 27 L. R. A. (N. S.) 376, *the question of fact to be first determined is whether the relation of master and servant actually existed at the time of the injury.* In the case at bar there can be no doubt that the relation existed. *Lamphere was subject to call at any hour of the day or night. And when he met his death he was doing what his master had ordered him to do. And, as alleged in the complaint, the things he was doing related exclusively to, were made necessary by, and in aid of, the interstate business of defendant. It follows, necessarily, that decedent was employed by the defendant in interstate commerce. Either this, or he was a stranger to defendant.*

The recent case of Moyse v. Northern Pacific Ry. Co. (Mont.), 108 Pac. 1062, is an interesting one.

"A freight conductor *who was required to be within call,* and who was expected to occupy the caboose of his train at night while awaiting the call to go on duty * * * was, while so occupying it, in the discharge of his duties, though his pay stopped on his registering on his arrival, and would not begin until he was called to make his return trip * * *."

Decedent was required to respond at any time. He had been called, and had been told what to do. He went about his work—interstate commerce work—and was killed. Can defendants contend that the relation of master and servant did not exist? If it did, decedent was employed by them in interstate commerce. If not, he was a stranger to them. In either case defendants are liable. They make take either position they choose. But only *one*,—and stand or fall by it.

WHICH CAUSE OF ACTION?

In our opinion, instead of not stating facts sufficient to constitute *a* cause of action, the Amended Complaint states enough facts for *two* causes of action. It is all a matter of emphasis—and jurisdiction.

1. Decedent, an employee of defendant, was killed on a *public crossing* by the negligence of defendant's servants, while on his way from his home to his work. His personal representative, therefore, may maintain an action for his death, for the benefit of his widow and child, under the Washington statutes.

Fletcher v. Baltimore & P. R. R. Co., 168 U. S. 135, 138.

Orman v. Salvo, 117 Fed 233, 54 C. C. A. 265.

2. But he was always on call. At the time he was

obeying the command of the master. The relation of master and servant, therefore, existed. The point at which he was killed was on the premises of the master,

and was used by decedent and other employees in the discharge of their duties. The things which he was engaged in doing related exclusively to, were in aid of, and made necessary by, the interstate business of defendant. He was, therefore, employed by defendant in interstate commerce. He was also a fellow servant of the persons who killed him. But the Employers' Liability Act abolishes the defense of negligence of fellow servants. An action may, therefore, be maintained thereunder.

Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, affirmed, 220 U. S. 608.

Fletcher v. Baltimore & P. R. R. Co., 168 U. S. 135, 138.

Orman v. Salvo, 117 Fed 233, 54 C. C. A. 265.

The power of Congress over interstate commerce, the corporations engaged, as well as the instrumentalities and persons used (or employed), therein, is supreme. The Employers' Liability Act, therefore, is exclusive; and any action in the premises must be maintained thereunder.

We ask that the judgment be reversed, and that the Court be instructed to overrule the demurrers of defendants.

Respectfully submitted,

W. H. PLUMMER *and*
HENRY JACKSON DARBY,
Attorneys for Plaintiff in Error.

APPENDIX.

No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living * * *; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of such wife and children. * * *.

1 Rem. & Bal. Annotated Code and Statutes of the State of Washington, Sec. 194.

When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages causing the death.

1 Rem. & Bal., etc., Sec. 183.

"While it is customary to prosecute such actions * * * in the names of the widow and children, they may likewise be prosecuted in the name of the personal representative for the benefit of the widow and children. Copeland v. Seattle, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333." Rudkin, *J.*, in

Archibald v. Lincoln County, 50 Wash. 55, 58; 96 Pac. 831.